

**OPINION  
67-200**

February 17, 1967            (OPINION)

Mr. M. F. Peterson

Superintendent

Public Instruction

RE: Schools - Teachers Contracts - Penalty

This is in reply to your letter of February 15, 1967, relative to procedures being used by some school districts to curtail or prevent the breaking of contracts on the part of teachers. You state there are three procedures that have come to your attention:

1. A school board offers a contract to a teacher with the stipulation that if the teacher does not fulfill the contract it will cost the teacher \$500.
2. If a teacher asks to be relieved of his or her contractual relations with the board, it will cost him money. Again the figure called to our attention was \$500.
3. In this instance, should a teacher ask for a release from the contract and this release is granted, that teacher will have to pay the board \$500, or whatever cost is involved in getting a replacement."

Section 15-47-28 of the North Dakota Century Code provides:

"SUSPENSION OF TEACHER'S CERTIFICATE FOR BREACH OF CONTRACT. In the event of breach of contract on the part of a teacher, the superintendent of public instruction shall suspend such teacher's certificate for a period of not to exceed one year, during which time it shall be unlawful for such teacher to receive payment for teaching in the public schools of North Dakota."

This statute is apparently a "preventive" measure, i.e., its enactment was primarily for the purpose of discouraging a teacher from breaking a contract and, by suspension of the teacher's certificate, to give notice to employing districts that such teachers has broken a contract in the past. This statute is not, however, exclusive. It does not prohibit other covenants from being inserted in the contract upon breach thereof.

The first provision relative to inserting a stipulation into the contract for \$500 in damages upon breach thereof appears to be, in effect, a provision for fixed damages. Section 9-08-04 of the North Dakota Century Code provides:

"FIXING DAMAGES FOR BREACH VOID - EXCEPTION. Every contract by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation is determined in

anticipation thereof is to that extent void, except that the parties may agree therein upon an amount presumed to be the damage sustained by a breach in cases where it would be impracticable or extremely difficult to fix the actual damage."

We are not prepared to state as a general rule that it would be impracticable or extremely difficult to fix the actual damages in the instance of breach of contract by a teacher. It might be that in certain instances such would be the case. However in view of the above cited statute we have serious doubts as to the insertion of the provision for liquidated damages in the teacher's contract with the school district.

Insofar as the second situation is concerned, the actual result may appear to be the same but the legal implications would appear to be different. The school board, if such a provision is inserted into the contract, is, in effect, stating that they will release the teacher from the contract upon consideration of the payment of \$500 by the teacher to the school district. The teacher has no legal right to be released from the contract except upon agreement by the school board. The release of the contract by the board does, in effect, amount to another contract with the teacher for which the board is entitled to legal consideration. If the teacher, pursuant to such contract, requests the release of the contract but refuses to pay the \$500, the school board would not, of course, be obligated to release the teacher. If the teacher then breaks the contract, the school district would not automatically be entitled to \$500 but would have to prove the damages to the school district resulting from such breach.

With respect to the third situation, the same rationale would appear to apply except that a provision to pay whatever cost is involved in getting a replacement would not appear to be an invalid provision since it sets no amount of liquidated damages but rather such damages would be determined if and when the teacher would ask to be released from the contract.

If, under the second or third situations, these provisions are not written into the contract but are merely conditions prescribed by the board at the time the teacher requests release from the contract, section 9-08-04, quoted above, would not be involved and the school district would appear to be within its rights to require such payments as a condition precedent to its granting the teacher a release from the contract.

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Attorney General